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No. 08-1049

In The

Supreme Court of the United States

ALFRED J. KREPPEIN, JR.,

Petitioner,

v.

RYAN BRICE CRANE, LAUREL CRANE LUQUETTE and FIRST COLONY LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In his Petition for Writ of Certiorari, Petitioner presents no "compelling reasons" for the Court to grant his Petition ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. There are no conflicts within the circuits to be resolved in this case, and there is no important question of federal law that has yet to be settled by the Court. Additionally, according to Sup. Ct. R. 10, a Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The courts below correctly rejected Petitioner's argument. In the absence of any tension in the circuits, there is no reason to second-guess the lower court rulings here.

None of the criteria warranting this Court's review is present in this case. The questions presented are not novel or emerging. Furthermore, Petitioner's assertion that the legal consequences of the failure to obtain the continuance was unfairly placed on his shoulders seriously misrepresents well-settled statutory and case law, holding that when a Mover fails to go forward on the date set for hearing, dismissal of the TRO is the appropriate remedy. The Petition therefore should be denied.

COUNTER-STATEMENT OF THE CASE

Stephanie Kreppein ("Ms. Kreppein") and Alfred Kreppein, Jr. ("Mr. Kreppein" or "Petitioner") were

married in November, 2000. Subsequently, Ms. Kreppein, as owner, purchased a term life insurance policy with First Colony naming Mr. Kreppein as the sole, primary beneficiary. On July 28, 2008, Ms. Kreppein moved out of her home with Mr. Kreppein in New Orleans, Louisiana, and into a home with her mother in Baton Rouge, Louisiana. On August 2, 2005, Mr. Kreppein filed a petition for divorce from Ms. Kreppein under Louisiana Civil Code Article 102, which sought incidental relief in the form of a temporary restraining order ("TRO"). The TRO issued by Judge Ethel Simms on August 2, 2005 prohibited Ms. Kreppein from encumbering or disposing of certain items of community property. Additionally, a hearing was set for August 16, 2005 to determine whether a preliminary injunction should be issued. The request for preliminary injunction went without hearing on August 16, 2005 and there was no request for a continuance filed with the Court by Mr. Kreppein. Additionally, the matter was never reset on the Court's docket. Subsequently, on August 22, 2005, First Colony received a Policy Change Form, signed by Ms. Kreppein, revoking Mr. Kreppein's designation as primary beneficiary and naming in his place her children, Ryan Brice Crane ("Mr. Crane") and Laurel Crane Luquette ("Ms. Luquette"), as the primary beneficiaries of the policy. Stephanie Kreppein died on October 11, 2005.

Under Ms. Kreppein's policy, upon her death, First Colony became obligated to pay the sum of $500,000.00 plus applicable interest to Mr. Crane and

Ms. Luquette. However, First Colony Life Insurance Company ("First Colony") filed a Complaint for interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure due to Mr. Kreppein's disputed assertion that he remained primary beneficiary. After depositing the insurance proceeds into the registry of the Court, First Colony filed for summary judgment seeking its dismissal from the action. Summary Judgment was granted in its favor on January 25, 2006. Thereafter, Mr. Crane and Ms. Luquette on the one hand, and Mr. Kreppein on the other, filed cross-motions for summary judgment asserting their respective claims. On August 24, 2006, the Court granted the cross-motion for summary judgment filed by Mr. Crane and Ms. Luquette and denied the cross summary judgment motion of Mr. Kreppein, finding among other things that the TRO was not in effect when Ms. Kreppein executed the change of beneficiary designations and that Mr. Crane and Ms. Luquette were the rightful beneficiaries of the proceeds from the First Colony insurance policy.

REASONS FOR DENYING THE WRIT

1. Petitioner's assertion that the TRO was in effect on August 22, 2005 seriously misrepresents well-settled statutory and case law, therefore, his Petition should not be granted when the asserted error consists of erroneous factual findings or misapplication of properly stated rule of law.

All of the lower courts agree that the temporary restraining order ("TRO") expired before Ms. Kreppein executed the Policy Change Form on August 22, 2005. Petitioner argues that the lower court's errors consist of erroneous factual findings and misapplication of properly stated rule of law. These contentions do not warrant this Court's review as per Sup. Ct. R. 10.

The TRO signed by Judge Ethel Simms Julien on August 2, 2005 required that Mr. Kreppein proceed contradictorily on August 16, 2005 with evidence to obtain a preliminary injunction. According to Louisiana Code of Civil Procedure, Article 3603, the TRO would have expired on August 16, 2005, when the Court set the hearing on the request for preliminary injunction. The language of Louisiana Code of Civil Procedure Article 3606 is not permissive but mandatory. It states that the party obtaining the TRO **shall** proceed with the application for a preliminary injunction when it comes on for hearing. Upon his failure to do so, the Court shall dissolve the TRO. *See* LSA-C.C.P. art. 3606. Despite the mandatory language of the statute, the August 16th hearing date passed

without a hearing being conducted. The record of the Orleans Civil District Court contains no filing by any party thereafter.

LSA-C.C.P. art. 3604(A) states that a temporary restraining order expires ten days after its issuance unless extended. LSA-C.C.P. art. 3604. Nevertheless, a TRO issued in conjunction with a rule to show cause for a preliminary injunction to prohibit a spouse from disposing or encumbering *community property* remains in force until a hearing is held on the rule for the preliminary injunction. LSA-C.C.P. art. 3604. However, when a TRO is issued restraining the disposition of community property, the application for preliminary injunction must be assigned for hearing at the earliest possible time and the party who obtains the TRO must proceed with the application for a preliminary injunction on the hearing date or the TRO dissolves. LSA-C.C.P. art. 3606; *Lewis v. Adams,* 679 So. 2d 493, 496 (La. Ct. App. 1996). Therefore, if the applicant fails to proceed on the hearing date, "*the court shall dissolve the temporary restraining order*" (emphasis added). LSA-C.C.P. art. 3606. This statutory scheme is misrepresented in the Petitioner's brief where it was argued that the TRO remained in effect until a hearing is actually had, regardless of the Mover's failure to attend the hearing date prescribed by the Court issuing the TRO.

It is clear that TRO's, which are granted without notice or hearing, are not intended to be more than a very short term solution. The preliminary and permanent injunction, unlike the TRO, requires notice to

the other party and opportunity for hearing. LSA-C.C.P. art. 3602. Mr. Kreppein did not go forward with the hearing as directed on August 16th to obtain a preliminary injunction; therefore, according to the Louisiana Code of Civil Procedure, the TRO was dissolved. **Temporary restraining orders which are not extended expire on the date fixed to show cause why a preliminary injunction should not issue.** *Austin v. Currie*, 134 So. 723 (La. App. 2d Cir. 1931). This means the TRO, as it pertains to the alienation of community property, was only in effect from August 2 through August 16, 2005 at the longest.

Despite Petitioner's suggestion that a continuance had been obtained on the hearing for the preliminary injunction which acted to extend the date the TRO would expire, each of the lower courts noted, a Motion for Continuance was never filed by Mr. Kreppein. (Pet. App. 9a; 31a). In fact, the record does not contain any evidence to support the claim that a continuance of the August 16 hearing date was obtained. Therefore, the lower courts' conclusion that the TRO was not in effect on August 22, 2005 when Ms. Kreppein changed the beneficiary on the First Colony Life Insurance Policy was correct. Furthermore, Petitioner asserts that the Court of Appeals' reading of LSA-C.C.P. art. 3604 together with LSA-C.C.P. art. 3606

> misreads settled Louisiana law and nonsensically gives a spouse who postpones the show-cause hearing with her own foot-dragging conduct carte blanche to dispose of

> marital property before trial, dispossessing the other spouse of marital property without due process of law and absent any order by the State court allowing her to do so.

(Pet. App. 16). Petitioner asserts that Ms. Kreppein and her counsel "foot-dragged their way to a postponement of the show cause hearing while she changed beneficiaries on her life insurance policy to Petitioner's detriment, in violation of the still-operative TRO and without any court order allowing her to do so." (Pet. App. 18). However, TRO's are granted to the moving party without notice to the party against whom the order is directed and without opportunity for hearing. The applicant of the TRO can extend or postpone the date of the hearing for good cause, **with or without** the consent of the party against whom the order is directed. *See* LSA-C.C.P. art. 3604. Therefore, it was not necessary for Ms. Kreppein or her attorney to consent to an extension of the TRO and Petitioner was free to protect himself from the expiration of the order on August 16, 2005 by simply requesting an extension of the TRO. With an ex parte motion, Petitioner could have extended the application of the TRO, if he chose to do so. As both courts noted, a Motion for Continuance was never filed by Mr. Kreppein. (Pet. App. 9a; 31a). Therefore, both courts properly concluded that the TRO was not in effect on August 22, 2005 when Ms. Kreppein changed the beneficiary on the First Colony Life Insurance Policy and Ms. Kreppein and her attorney could not "foot drag" their way to a postponement of the

show-cause hearing by feigning cooperation without the Mover's acquiescence.

2. Petitioner's assertion that the legal consequences of the failure to obtain the continuance was unfairly placed on his shoulder seriously misrepresents well-settled statutory and case law, which holds that when a Mover fails to go forward on the date set for the hearing for the injunction, dismissal of the TRO is the appropriate remedy, therefore, not warranting this Court's review as per Sup. Ct. R. 10.

Mr. Kreppein next argues that the consequence of the failure to obtain the continuance was unfairly placed on his shoulders when the Judge blamed the Petitioner ("Husband") – not the wife, who supposedly "engineered the postponement of the scheduled hearing on the preliminary injunction so that they (sic) could claim freedom from a court order prohibiting them from changing beneficiaries for the wife's insurance policy." (Pet. App. 26). The consequences arising out of the failure to obtain the continuance were attributed to the Petitioner ("Husband") because he was the "Mover" or the party seeking the injunction. It was the husband's motion that was unsupported by his absence on August 16, 2005. The burden is on the party who obtains the TRO to proceed with the application for a preliminary injunction when it comes on for hearing, and upon his failure to do so,

the Court was obligated to dissolve the TRO. *See* LSA-C.C.P. art. 3606.

3. Petitioner's assertions that the federal courts' actions violated the Full Faith and Credit Clause is entirely unfounded because the lower courts followed and applied well-settled Louisiana state laws relative to *Res Judicata*, therefore, not warranting this Court's review as per Sup. Ct. R. 10.

In his Petition, Mr. Kreppein states that the federal courts' actions violated the Full Faith and Credit Clause, undermining the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), implying that the outcome of this matter would be different had it been decided in state court. (Pet. App. 19). Petitioner's contentions are entirely unfounded. The district court and the Fifth Circuit followed and applied well-settled Louisiana state laws but concluded Res Judicata and/or preclusion did not apply because the incidental relief sought in the divorce had been abandoned.

Furthermore, *Res Judicata* is codified in Louisiana Civil Code of Procedure Article 425, titled "Preclusion by Judgment" as well as in LSA-R.S. 13:4231, titled "Res Judicata" and LSA-R.S. 13:4232, titled, "Exceptions to the general rule of res judicata." Louisiana Code of Civil Procedure Article 425 states:

> A. A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.
>
> B. Paragraph A of this Article shall not apply to an action for divorce under Civil Code Article 102 or 103, an action for determination of incidental matters under Civil Code Article 105, an action for contribution to a spouse's education or training under Civil Code Article 121, and an action for partition of community property and settlement of claims between spouses under R.S. 9:2801.

LSA-R.S. 13:4232, Exceptions to the general rule of res judicata, states:

> A. A judgment does not bar another action by the plaintiff . . .
>
> B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contribution to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R.S. 9:2801, the judgment has the effect of res judicata only as to causes of action actually adjudicated.

The Louisiana state court proceeding filed by Mr. Kreppein sought a divorce in accordance with Louisiana Civil Code Article 102. Mr. Kreppein's Petition

was styled as a "Petition For Divorce Pursuant to Louisiana Civil Code Article 102 and Determination of Incidental Matters." Therefore, pursuant to LSA-C.C.P. art. 425 and LSA-R.S. 13:4232, *res judicata* or *preclusion by judgment* does not apply to divorce proceedings brought under Louisiana Civil Code Article 102 unless the matter is actually adjudicated. Additionally, *res judicata* or *preclusion by judgment* does not apply to any determination of incidental matters in divorce proceedings, such as injunctive relief pursuant to Louisiana Civil Code Article 105. Therefore, *res judicata* is inapplicable to the case at issue.

4. According to well-settled Louisiana case law, the TRO in this case, had no application to the proceeds of the First Colony Life Insurance Policy because it was not community property, therefore, in essence, Ms. Kreppein was never legally precluded from executing the Change of Beneficiary Designation, therefore, Petitioner attempts to identify an issue meriting this Court's attention, but, seriously misrepresents well-settled Louisiana statutory and case law and therefore Petitioner's Writ should be denied.

A TRO that is issued without notice to the other party or opportunity for hearing is not considered a final adjudication of the facts determining ownership or classification of property as community or separate. The TRO awarded under Louisiana Code of Civil Procedure Article 3604 only applies to "assets of the

community" and proceeds of a life insurance policy are not community property. LSA-C.C.P. art. 3604 allows for TRO's to remain in effect beyond the customary 10 day expiration period until a hearing is held on the rule for a preliminary injunction when the TRO prohibits "disposing of or encumbering *community property*" (emphasis added). LSA-C.C.P. art. 3604. Otherwise it expires on its face on the 10th day following its issuance. In summary, if the TRO restrained disposition of Ms. Kreppein's separate property, it expired ten (10) days after issuance. If it applied to community property, it could remain in effect until the date the hearing is set on the preliminary injunction, which in this case was August 16, 2005. In either case, the TRO would have expired on August 22, 2005 when the Change of Beneficiary Form was executed.

Additionally, respondents maintain that the TRO had no application to the First Colony policy because the proceeds of a life insurance policy, which is not payable to the insured's estate, is not a community asset. *Fowler v. Fowler*, 861 So. 2d 181 (La. 2003). Louisiana law has consistently recognized a clear distinction between ownership of a life insurance policy (and the benefits thereof during the insured's life) and the ownership of the death benefits or proceeds of the policy. *Jackson National Life Ins. Co. v. Kennedy-Fagan*, 873 So. 2d 44 (La. App. 1st Cir. 2004). Recall that Ms. Kreppein changed beneficiaries on August 22, 2005, not ownership of the policy.

This distinction between the right to change ownership and the right to change beneficiaries was further emphasized by Louisiana's Fourth Circuit Court of Appeal in *Succession of Jackson*, 402 So. 2d 753 (La. App. 4th Cir. 1981). Under circumstances very similar to those in our case, Jackson, who had separated from his wife, Dorothy Gray Jackson in November of 1976, had acquired several life insurance policies during the marriage. During the course of the separation proceedings the trial court issued a preliminary injunction against both of the Jacksons ordering them not to dispose of community property. In February of 1979, Mr. Jackson obtained a Haitian divorce from Dorothy Jackson and married Elaine Mead Jackson. Mr. Jackson thereafter changed the beneficiary on the life insurance policies from Dorothy Jackson to Elaine Jackson. Mr. Jackson died on September 25, 1979, with Elaine Jackson still named as beneficiary.

At the time Mr. Jackson executed the change of beneficiary designation, a preliminary injunction restraining him from disposing of the community property was still in effect. Dorothy Jackson contended that the act of changing beneficiaries on the policy was in violation of the injunction and thus invalid. However, the Fourth Circuit held that the proceeds of a term policy acquired during the existence of the community is not a community asset and thus did not come within the scope of the injunction which protected the community property. The Court stated that the ownership of a policy of life insurance, whether it is separate or community property, is

determined by the marital status of the owner at the time the policy is issued. *Succession of Jackson*, 402 So. 2d 753 (La. App. 4th Cir. 1981). However, the death benefits or proceeds of a life insurance policy with a named beneficiary other than the estate of the insured owner, do not form part of the owner's estate either separate or community, but belongs to the validly designated beneficiary. *Id.* Therefore, the proceeds of a life insurance policy are not community property. Therefore, the injunction did not bar Mr. Jackson's right to change his beneficiary.

Similarly, the TRO issued in this case only prohibited the disposal of community property. Since the proceeds of a life insurance policy are not community property, even if the TRO issued was in effect on August 22, 2005, it did not bar Ms. Kreppein's right to change her beneficiary on the term life policy she owned.

The TRO was not in effect at the time Ms. Kreppein executed the Change of Beneficiary Designation. The TRO was dissolved by law when the hearing for the preliminary injunction did not go forward on August 16, 2005, as scheduled. However, even if the TRO was in effect, since the proceeds of a term life insurance policy are not community property and the First Colony Life Insurance Policy was a term life policy, the TRO did not bar Ms. Kreppein from changing the beneficiary on the First Colony Life Insurance Policy. Therefore, Ms. Kreppein was not legally precluded from executing the Change of Beneficiary

Designation on August 22, 2005 and Petitioner's Petition for Writ of Certiorari should be denied.

In his Petition, Petitioner attempts to identify an issue meriting this Court's attention, but, as seen above, seriously misrepresents well-settled Louisiana statutory and case law. Therefore, Petitioner's Writ should be denied.

CONCLUSION

For all of the reasons discussed herein, Petitioner has failed to show that the Fifth Circuit's Opinion is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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